

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

KENNETH FITCH and
ESTATE OF DIANNE L. FITCH

Plaintiffs,

v.

FEDERAL HOUSING FINANCE
AGENCY, FEDERAL NATIONAL
MORTGAGE ASSOCIATION,
WELLS FARGO BANK, N.A.,
HARMON LAW OFFICES, P.C., and
266 PUTNAM AVENUE, LLC

Defendants.

Civil Action No. 1:18-cv-00214

**DEFENDANT 266 PUTNAM AVENUE, LLC’S MOTION TO DISMISS
FOR FAILURE TO JOIN A NECESSARY PARTY OR,
ALTERNATIVELY, FOR FAILURE TO PROSECUTE**

Pursuant to Fed. R. Civ. P. 12(h)(2), 19, and 41(b), Defendant 266 Putnam Avenue, LLC (“Putnam”), hereby moves to dismiss the Complaint filed by Plaintiff Estate of Dianne Fitch (the “Estate”), through its administrator, Kenneth Fitch, on April 19, 2018. In this matter, the Estate is seeking to void a foreclosure sale of the real property located at 73 Kay Street in Cumberland, Rhode Island (the “Property”)—which was sold to Defendant 266 Putnam Avenue, LLC (“Putnam”)—because of various alleged deficiencies with the foreclosure process. Dismissal is warranted for two independent reasons.

First, Plaintiff has inexplicably failed to add an indispensable party, Rushmore Loan Management Group (“Rushmore”), whom the Estate alleges was the mortgagee at the time of the foreclosure sale. Despite representing that it would do so during the parties’ case management conference with the Court, and despite receiving **four** extensions of the deadline to amend its

Complaint to add Rushmore as a party, the last of which passed on February 4, 2019, the Estate has still not filed an amended complaint. Because the Estate has failed to join Rushmore, the case should be dismissed for failure to join an indispensable party pursuant to Fed. R. Civ. P. 12(h)(2) and 19.¹

Second, Plaintiff has wholly failed to prosecute this action. This case has been pending for 18 months and the Estate has not filed an amended complaint, nor has it taken any discovery (fact discovery closed at the end of July). This unnecessary delay in prosecuting this case benefits Mr. Fitch, who has been living in the Property for free for more than two years, while Putnam has been stuck paying the real estate taxes and other property related expenses, and has been unable to access the party or use it to generate revenue. Putnam commenced an eviction action against Mr. Fitch in October 2017, but, due to the allegations in this case, that case has completely stalled. Given the aforementioned circumstances, dismissal under Rule 41(b) for failure to prosecute is appropriate.

WHEREAS, for the forgoing reasons and the reasons set forth in Putnam's contemporaneously filed Memorandum of Law in support hereof, Putnam requests that the Court grant its Motion to Dismiss and dismiss the Estate's Complaint with prejudice.

REQUEST FOR HEARING

Pursuant to Local Rule 7(c), Putnam hereby requests oral argument on the instant motion. Counsel does not anticipate the argument requiring more than 30 minutes in total.

¹ Putnam's motion to dismiss for failure to join an indispensable party is brought pursuant to Fed. R. Civ. P. 12(h)(2), which permits the issue to be raised either as a Rule 12(c) motion for judgment on the pleadings or at trial. Putnam's Answer to the Complaint (Docket Entry No. 36) did not raise failure to join an indispensable party as an affirmative defense. Putnam did not move to amend its Answer, however, in reliance upon Plaintiffs' representations, as described in the Memorandum of Law filed in support hereof, that it was going to file an amended complaint to add the indispensable party. Accordingly, if the Court deems it procedurally necessary, Putnam requests that it be granted leave to file an amended answer to add the affirmative defense of Plaintiffs' failure to add a necessary party.

266 PUTNAM AVENUE, LLC

By its attorney,

/s/ Zachary W. Berk

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DATED: November 8, 2019

CERTIFICATE OF SERVICE

I, Zachary W. Berk, counsel for Defendant 266 PUTNAM AVENUE, LLC, hereby certify that I served a true copy of the within document upon all counsel of record through the Court's electronic filing system.

11/08/19

Date

/s/ Zachary W. Berk

Zachary W. Berk